

STATE OF MICHIGAN
COURT OF APPEALS

NGHIEP KIEN LE and LANY TANG LE,

Plaintiffs-Appellants,

v

TIMBERLINE BUILDING & DESIGN, INC.,

Defendant-Appellee.

UNPUBLISHED

July 26, 2002

No. 229115

Washtenaw Circuit Court

LC No. 99-10339-CK

Before: Murray, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Plaintiffs Nghiep Kien Le and Lany Tang Le appeal by leave granted the trial court's order that dismissed without prejudice their complaint and defendant Timberline Building & Design, Inc.'s counterclaim on the basis of an arbitration agreement between the parties. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs argue that the lower court erred in dismissing their complaint and defendant's counterclaim because defendant waived the defense of arbitration by failing to raise in its first responsive pleading. We agree.

Although not labeled as such, defendant's motion seeking dismissal of the case on the basis of an arbitration agreement between the parties fell within the parameters of MCR 2.116(C)(7). We review de novo a motion brought and decided pursuant to MCR 2.116(C)(7). *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000).¹

Pursuant to MCR 2.111(F)(3), "[a] party waives an affirmative defense unless the defense is set forth in its first responsive pleading." *Kelly-Nevils v Detroit Receiving Hospital*, 207 Mich App 410, 420; 526 NW2d 15 (1994). MCR 2.111(F)(3)(a) sets forth numerous affirmative

¹ Defendant's motion in the lower court, which was brought pursuant to MCR 2.119, was in part improperly designated as a motion in limine. The portion dealing with arbitration was not a proper motion in limine as it did not seek to exclude evidence. Rather, the motion should have been brought pursuant to MCR 2.116(C)(7) as that court rule provides the specific avenue of relief sought in defendant's motion. Since the trial court did not indicate under which court rule it was granting defendant's motion, we will review it as if it was decided under the proper court rule.

defenses among which are “the existence of an agreement to arbitrate.” Thus, because the existence of an arbitration agreement is an affirmative defense, defendant was required to assert the defense in its first responsive pleading, whether that be by the filing of affirmative defenses or a motion for summary disposition under MCR 2.116(C)(7). *Campbell v St John Hospital*, 434 Mich 608, 616-617; 455 NW2d 695 (1990).

In the present case it is undisputed that defendant did not assert the existence of the arbitration agreement in its affirmative defenses, nor did it file a motion for summary disposition under MCR 2.116(C)(7) (or under any other court rule) as its first responsive pleading. It is also undisputed that defendant never sought to amend its pleadings to assert the existence of the arbitration agreement as an affirmative defense. Instead, the first time defendant raised the existence of the arbitration agreement was in its June 26, 2000 “motion in limine” that was filed approximately sixteen months after the complaint was filed. During those approximately sixteen months, the parties engaged in discovery, mediation, scheduling conferences, and the submission of trial briefs. As noted, at no time did defendant seek to amend its affirmative defenses to include the existence of the arbitration agreement. Accordingly, defendant waived the affirmative defense as a matter of law and the circuit court erred in dismissing plaintiff’s complaint and defendant’s counter-claim on the basis of the arbitration agreement contained within the contract.²

Reversed.

/s/ Christopher M. Murray
/s/ William B. Murphy
/s/ Kirsten Frank Kelly

² During arguments before the trial court, the Supreme Court decision in *Campbell* was discussed, but the lower court never explained why it did not control the instant case. Rather, citing to a policy of encouraging alternative dispute resolution, the court simply dismissed the case because arbitration, which the parties had agreed to in the contract, was a good way of attempting to settle the case.